

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE

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5 UNITED STATES OF AMERICA, :
6 Plaintiff, :
7 WALKER RIVER PAIUTE TRIBE, :
8 Plaintiff-Intervenor, : No. 3:73-CV-127-RCJ-WGC
9 -vs- : May 5, 2015
10 WALKER RIVER IRRIGATION : Reno, Nevada
11 DISTRICT, a corporation, et :
12 al., :
13 Defendants. :
14 :

15 TRANSCRIPT OF MOTION HEARING

16 APPEARANCES:

17 FOR THE PLAINTIFF: ANDREW "GUSS" GUARINO
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20 FOR THE WALKER RIVER WES WILLIAMS, JR.
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22 (Appearances continue on next page.)

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2

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1 RENO, NEVADA, MONDAY, MAY 4, 2015, 10:02 A.M.

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4 THE COURT: We're here once again -- welcome to
5 our quarterly get together, United States versus Walker River.
6 Let's start with appearances, please.

7 MR. GUARINO: Good morning, your Honor. For the
8 United States, Guss Guarino. I'm also here with counsel for
9 the United States David Negri.

10 THE COURT: Thank you.

11 MR. WILLIAMS: Good morning. Wes Williams, Jr.,
12 on behalf of Walker River Paiute Tribe.

13 MR. HERSKOVITS: Good morning, your Honor.
14 Simeon Herskovits here on behalf of Mineral County and the
15 Walker Lake Working Group, and with me is my colleague
16 Michelle Miano.

17 THE COURT: Thanks so much.

18 MR. DePAOLI: Good morning, your Honor. Gordon
19 DePaoli on behalf of the Walker River Irrigation District.

20 MR. FERGUSON: And Dale Ferguson on behalf of
21 the Walker River Irrigation District.

22 MS. SCHROEDER: Laura Schroeder on behalf of
23 various water users in the Walker River Basin.

24 MR. SWAINSTON: Harry Swainston on behalf of the
25 owners of Swainston-Wiggins Farms.

1 MR. STOCKTON: Bryan Stockton on behalf of
2 Nevada Department of Wildlife.

3 MS. SIMON: Good morning, your Honor.

4 THE COURT: Good morning.

5 MS. SIMON: Stacey Simon on behalf of Mono
6 County, and with me today is Tim Fesco, he is our District
7 Forest Supervisor from northern Mono County. His district
8 includes Bridgeport and Antelope Valleys.

9 THE COURT: Very good. Thank you, sir.

10 MS. URE: Good morning, your Honor. I'm Therese
11 Ure with Schroeder law office, cocounsel with Laura Schroeder,
12 and we also have Matt Curti in the room with us.

13 THE COURT: Thank you.

14 And no one on the phone, right?

15 THE CLERK: Yes, your Honor.

16 THE COURT: On the telephone, please.

17 MS. ALMENDRAS: Good morning, your Honor. This
18 is Annadel Almendras appearing on behalf of the California
19 state agencies, and I believe also on the telephone is Erin
20 Mahaney, staff counsel with the California State Water
21 Resources Control Board.

22 THE COURT: Thank you. Thank you both.

23 All right. This is motion to dismiss, several
24 motions, 2160, 61 and 64, in this current subfile 127.

25 As I've previously explained, of course, we have

1 several subfiles. Judge Reed had previously only segregated
2 these as subfiles, and administratively he did not
3 consolidate -- he did not separate these on merits issues and
4 therefore we're treating it that way.

5 We have separate motions to dismiss that we've
6 already heard oral argument on, and, as I told you, I was not
7 taking those items under submission until we had all of them
8 in all of the subfiles argued.

9 So, for the record, this is the final argument
10 on motion to dismiss in 127. We've already taken the oral
11 arguments on the other subfiles, and it's my intent after oral
12 argument to issue orders in all of those matters.

13 By the way, I may well issue certification for
14 appeal with all of those orders because I think what we're
15 doing is we're laying out the initial matters of law that we
16 can determine without factual determinations.

17 And I think it's fully right before we expend --
18 all of us expend a lot more effort on factual matters, that we
19 certify it, let the Circuit tell us what the law is, as
20 they're wont to do, in both the Ditch Decree and the Alpine
21 Decree and, of course, in the Walker River Decree.

22 So I think that makes sense to certify them.
23 You'll tell me if you object to that.

24 And, with that, we'll take the oral arguments,
25 and then all of those will be under submission. I await your

1 comments on the motions to dismiss, please.

2 MR. DePAOLI: Good morning, your Honor. Gordon
3 DePaoli on behalf of the Walker River Irrigation District.

4 Your Honor, the District's motion is directed at
5 the amended counterclaims of the Tribe and the United States,
6 and it goes at the subject matter jurisdiction from two
7 perspectives.

8 The first perspective is what, if any,
9 jurisdiction does the decree court have by reason of the
10 litigation which resulted in the Walker River Decree, and
11 secondly from the standpoint of what jurisdiction does the
12 Court have based on the other independent grounds alleged in
13 the amended counterclaim for subject matter jurisdiction.

14 On the first issue, that is, the jurisdiction
15 based upon the Walker River Decree and the action which
16 resulted in the Walker River Decree, the United States and the
17 Tribe take the position that the Court has exclusive and
18 ongoing jurisdiction to hear and determine all additional
19 water right claims, not only to the Walker River and its
20 tributaries, but to all sources of water within the Walker
21 River Basin.

22 The United States essentially says that this
23 Court has the jurisdiction to determine in the first instance
24 whether additional water rights exist.

25 As to that argument, the argument based upon the

1 decree, there is no law, your Honor, which supports the
2 concept that a court which enters a water decree in a quiet
3 title action thereafter acquires the authority to determine
4 all additional claims to water rights, not only from the
5 source that was involved in the decree, but from all sources
6 in the watershed.

7 The action here and the action in -- the
8 previous action in 1919 which resulted in Decree 731 were in
9 *personam* quiet title actions.

10 The action which led to this decree was
11 supported by a special statute in effect only for three years,
12 from 1922 to 1925, that essentially gave the court
13 jurisdiction, the Nevada District Court, jurisdiction,
14 personal jurisdiction, over any person who had a claim
15 regardless of whether they were resident within the district.

16 As I say, there is no case that supports such a
17 broad interpretation of what a court that enters a water
18 decree can do as to additional claims to water.

19 I think the most important reason why this
20 Court, and really no other court, has that kind of
21 jurisdiction is the fact that there are two sovereign states,
22 Nevada and California, whose law controls how additional water
23 rights are to be established to the Walker River and its
24 tributaries and to other sources of water within the Walker
25 River Basin, and --

1 THE COURT: Just a quick question.

2 Assuming you're right, don't I still have
3 jurisdiction at least to declare that there was an implied
4 water right transferred when additional lands were granted to
5 the Tribe?

6 In other words, even if I agree with you that I
7 don't have authority to declare those rights or to appropriate
8 them unless I'm amending the original decree under a 60(b)
9 standard, don't I at least have jurisdiction to say under a
10 requested amendment of the decree that, yes, additional grants
11 of land are accompanied with an implied transfer of any water
12 rights applicable to those new lands?

13 MR. DePAOLI: I think, your Honor, that your
14 Honor, sitting as the United States District Court for the
15 District of Nevada, as distinguished from the court which
16 entered the decree, would have the authority to determine
17 whether there is, in fact, an implied reserved right for those
18 added lands and determine what it is and quantify it if it
19 exists.

20 And then I think your Honor, sitting as the
21 decree court for administration, would have the authority to
22 require that water right as declared in a separate and
23 independent action administered pursuant to your decree in
24 this case.

25 THE COURT: Go ahead.

1 MR. DePAOLI: As I say, Nevada and California
2 law, as to state-law-based water rights, require certain
3 actions to be taken before state agencies before those rights
4 can in fact be found to exist and to be perfected.

5 THE COURT: Well, now, that's true even if I
6 disagree with you, is it not?

7 In other words, even under the government's
8 approach, I have jurisdiction to declare a transfer of implied
9 rights. But even under Circuit law, it first has to go to the
10 state agencies with regard to appropriation, does it not, even
11 under the government's approach?

12 MR. DePAOLI: I --

13 THE COURT: But with review to this court.

14 MR. DePAOLI: Two things about that, your Honor.
15 I'm not sure that's the government's position.

16 THE COURT: I'm not sure either, but --

17 MR. DePAOLI: But I agree with your Honor that
18 if there was a new appropriation to water in the basin, and if
19 it was after the state had acted, it could be brought into the
20 decree for administration.

21 But we --

22 THE COURT: So, for example, what I'm suggesting
23 and asking you to contradict or not, is I have jurisdiction to
24 declare that there was a transfer of implied rights, but what
25 those rights were, either pre Nevada statute, pre California

1 statute, or post, where the state engineer in the case of
2 Nevada, for example, has to entertain a new application, in
3 all events it goes to those state agencies with regard to
4 appropriation especially with regard to new sources.

5 Is that an inappropriate structure or analysis
6 structure?

7 MR. DePAOLI: No, your Honor, except that it's
8 not clear that many of these rights that are being claimed
9 under state law, or even under federal law, are rights that
10 would require administration under the Walker River Decree.

11 They may be for -- and I think in fact are for
12 springs and seeps that probably never reach the Walker River
13 or any of its tributaries at all, and in those cases --

14 THE COURT: Well, at a minimum don't I have an
15 obligation to -- relative to amending the decree, relative to
16 declaring the priorities?

17 In other words, if the state engineer were to
18 say, even pre Nevada statute, that there was water
19 beneficially used on those lands more recently transferred to
20 the Tribe, or, at a minimum, if the Tribe is asking for
21 newly-appropriated rights for the transfer of water rights
22 that came impliedly to them, don't they have to go to the
23 state agencies with review by this Court?

24 Tell me what's wrong with that analysis.

25 MR. DePAOLI: I don't think -- in the context of

1 the Orr Ditch litigation, the Alpine litigation, I don't think
2 this Court has the authority to review new appropriations that
3 don't -- in the basin.

4 THE COURT: Now, the Ninth Circuit recently told
5 Judge George in *Orr Ditch* that his refusal on jurisdiction
6 grounds to entertain the groundwater implications to the
7 Truckee River was wrong and that he had to entertain that
8 because that was within his jurisdiction. It did impact the
9 flow in the river.

10 MR. DePAOLI: In that case, there were -- the
11 Ninth Circuit drew a distinction between the 1859 right for
12 the Pyramid Lake Reservation that was recognized in the Orr
13 Ditch Decree, and said exactly what your Honor said, that
14 Judge George had the jurisdiction and should determine whether
15 the groundwater -- groundwater appropriation that had been
16 granted would adversely affect that right.

17 THE COURT: So at a minimum don't I have to hone
18 to the Ninth Circuit's analysis in that case?

19 MR. DePAOLI: In that situation, yes, your
20 Honor, if there is a claim that there is that kind of
21 interference.

22 But the other thing that the Ninth Circuit said
23 was -- and the Pyramid Tribe has an appropriation under state
24 law postdecree with, I think, a 1973 priority, and the Ninth
25 Circuit said the *Orr Ditch* court would not have any

1 jurisdiction to determine if that right was adversely affected
2 by the groundwater decision made by the state engineer.

3 THE COURT: And that's clear from the Ninth
4 Circuit's discussion.

5 MR. DePAOLI: I believe so, your Honor.

6 THE COURT: So at a minimum I need to hone to
7 that analysis.

8 MR. DePAOLI: Yes. If there is an allegation of
9 interference, yes.

10 THE COURT: Okay.

11 MR. DePAOLI: The other ground for that claim of
12 jurisdiction under the decree, your Honor, is paragraph 14
13 which is a fairly short paragraph where the Court retained
14 jurisdiction of the cause for the purpose of changing the duty
15 of water or correcting or modifying the decree and also for
16 regulatory purposes.

17 The United States and the Tribe in effect read
18 that provision as if it says the Court retains exclusive
19 jurisdiction to determine all subsequent claims to water,
20 based upon federal or state law, from the Walker River and
21 from all other sources of water within the Walker River Basin.

22 It cannot be interpreted that broadly. That
23 provision was included in the decree in 1936 by a judge who
24 had ruled that all of the water rights in the decree had to be
25 acquired under state law. It was a judge who had very clearly

1 recognized that since 1905 in Nevada, and 1914 in California,
2 that people had to go to the state engineer or the California
3 State Water Resources Control Board to appropriate water.

4 And there are other provisions in the decree
5 where that's recognized. There are numerous permits and
6 applications that were pending before the state engineer which
7 the decree says are subject to final action by the state
8 engineer.

9 There is a provision in paragraph 8 that says
10 that the permits that the district was seeking was subject to
11 final action by California.

12 So we think that the construction principles for
13 the word modifying do not provide any justification for that
14 kind of a broad interpretation of it, and our interpretation
15 doesn't render that word meaningless or superfluous.

16 The Court can and has modified the decree in
17 ways that aren't corrections of it. The argument is that
18 we're reading it to mean only corrections, but modify means to
19 change, and to change can be a change to something that was
20 correct in the first instance.

21 When the Court approves modifications for new
22 points of diversion and places of use, that's a modification.
23 The Court, when it decided to appoint a six-person board of
24 water commissioners rather than a single water master, in
25 effect modified the decree, and there are provisions in the

1 1940 amendment to the decree that go beyond the Ninth Circuit
2 mandate that are also modifications.

3 The Tribe and the United States rely on the
4 *Arizona v California* line of cases to support their position,
5 and we think they actually support our position.

6 When the first *Arizona v California* case was
7 decided and the decree was issued, the Court expressly
8 recognized that not all aspects of the case were finally
9 resolved by the 1964 decree.

10 The Court had determined that certain -- that
11 the special master should not have resolved boundary disputes
12 for two reservations and provided in paragraph 2(d) of the
13 decree that the water rights for those two reservations would
14 be subject to appropriate adjustment by agreement or decree in
15 this court in the event that the boundaries of the reservation
16 are finally determined.

17 The decree also contains a much broader
18 provision in paragraph 14 which allows the parties to apply at
19 the foot of the decree for its amendment, or for further
20 relief, a retention of jurisdiction for any order, direction,
21 or modification of the decree, or any supplementary decree,
22 that may at any time be deemed proper in relation to the
23 subject matter of the action.

24 The United States tries to shoehorn this case
25 into the *Arizona v California* mode by arguing that the judge

1 in 1936 knew that the United States had an anticipated and
2 obvious claim for storage water not resolved under the decree
3 and therefore retained broad jurisdiction to decide it.

4 Such a retention of jurisdiction in that case
5 would have been inconsistent with what the judge had already
6 ruled. He had already ruled that the rights of the United
7 States would have to be adjudged, measured and administered in
8 accordance with the laws of the State of Nevada. So in that
9 context he knew that they would have to go to the state
10 engineer for a new appropriation.

11 In short, your Honor, we don't think there is
12 any subject matter jurisdiction in the decree court over the
13 amended counterclaims, not to say that once rights are finally
14 determined that the decree court would not have some authority
15 and jurisdiction to require that certain of the rights be
16 administered in priority in accordance with the decree.

17 Because of that, I think that -- we think that
18 the Court is left with either dismissing the amended
19 counterclaims or treating them as if they had been initiated
20 as new and separate actions, and we think that the Court has
21 that authority under the Federal Rules of Civil Procedure Rule
22 1 and Rule 8(e) which require that the rules be interpreted to
23 secure the just, speedy, and inexpensive determination of
24 every action in proceeding.

25 And for the Court -- if the Court doesn't have

1 that power, which we think it does have, the Court would be in
2 the position of saying the last 22 years are for naught, we're
3 going to dismiss everything and everybody has to start over.

4 And in the situations where the Court can --
5 when it knows that it would simply require the action to be
6 refiled, the Court can treat the amended counterclaims as a
7 complaint in a new action. At least that is our position,
8 your Honor.

9 In the context of a new action, our principal
10 disagreement with the United States is over subject matter
11 jurisdiction as it relates to the claims made by the United
12 States for surface water and groundwater based upon state law,
13 and we are trying to address those jurisdictional issues based
14 upon pleadings which are extremely broad, very general and
15 nonspecific about the details of the water rights which are
16 actually being claimed by the United States.

17 The United States approaches those --
18 jurisdiction over those claims from two angles. One is
19 supplemental jurisdiction and the other is jurisdiction with
20 the United States as plaintiff.

21 I address the United States as plaintiff first
22 because I think that without more, 28 USC 1345 does provide
23 subject matter jurisdiction to consider the claims of the
24 United States based upon state law.

25 However, based upon the pleadings as they exist,

1 we think that in a number of instances there is a serious
2 question as to whether the claims alleged are actually ripe
3 for any action by the Court in a separate action.

4 I think there are three contexts where that
5 comes up. The first is with respect to claims made for
6 National Forest lands and BLM lands where the United States
7 alleges it is entitled to appropriate water rights that either
8 have been permitted and certificated under Nevada or
9 California state law, or have applications to appropriate
10 pending before the state engineer and the California State
11 Board.

12 Until those administrative processes are
13 complete, there really isn't anything for the Court in an
14 independent action to do, if ever.

15 And I say "if ever," because it is not clear why
16 the United States would need a federal court determination
17 that it holds a certificate of appropriation to surface or
18 groundwater in Nevada, or a license to appropriate surface or
19 groundwater in the state of California. It either has it or
20 it doesn't have it. It doesn't need a federal court blessing
21 of either having it or not having it.

22 The other area where we think the allegations
23 are insufficient relate to the groundwater claims in
24 California.

25 Except with respect to the Marine Mountain

1 Warfare Training Center, we can't tell from the pleadings
2 whether the claims under the overlying groundwater right area
3 in California are actually being exercised.

4 If they are not being exercised, and because we
5 don't have a groundwater adjudication going on here, there
6 really isn't much for the Court to do in that context either
7 other than to confirm whatever the groundwater law is in the
8 state of California.

9 The third action is similar with respect to the
10 riparian claims of the United States. Again, we can't tell if
11 those claims involve riparian rights that are actually being
12 exercised, or simply dormant riparian rights, or alleged
13 riparian rights. And, again, if they're not being exercised,
14 it's not clear exactly what the Court ought to be doing.

15 So in summary, your Honor -- and my thinking on
16 this has evolved as these motions have been briefed and in
17 preparation for this argument. Here is where I come out on
18 state law on jurisdiction over the state law claims under
19 1345.

20 In the context of a new action, I think the
21 Court has jurisdiction over the claims of the United States
22 based upon state law for, one, surface water alleged to be
23 appropriated under Nevada law prior to 1905, in other words,
24 no permit required, second, surface water alleged to be
25 appropriated under California law prior to 1914, again, no

1 permit required, and, thirdly, alleged rights to groundwater
2 alleged to be appropriated under Nevada law prior to the time
3 when Nevada required a permit from the state engineer to
4 appropriate groundwater.

5 That's how I ultimately come out in the context
6 of treating the amended counterclaims as a new action.

7 Lastly, your Honor, and this wasn't -- it seemed
8 like we were asked to address what I refer to as the surface
9 groundwater interrelationship issues. There were four of
10 those in the case management order.

11 The first one was what jurisdiction does the
12 Court have to decide the United States' and Tribe's claims to
13 groundwater. Again, in the context of the new action, the
14 Court has that jurisdiction.

15 To the extent the claims are based on federal
16 law --

17 THE COURT: That's a specific area where Judge
18 Reed expressed some concern.

19 MR. DePAOLI: Yes, your Honor.

20 THE COURT: Whether he had any jurisdiction. He
21 asked the question, he didn't rule, whether he had any
22 jurisdiction to entertain the implication of new groundwater
23 or groundwater rights as opposed to the Orr Ditch analysis
24 where it affected the flow.

25 MR. DePAOLI: Yes, and groundwater based on the

1 vested rights or prepermit requirements in Nevada, and, again,
2 that's in the context of a new action.

3 The second question was what law governs
4 groundwater on federal reservations, and I think that flows
5 directly from the law in which the groundwater right is based.
6 If it is based on federal law, implied reservation of water
7 doctrine, it's federal law. If it's based on state law, it's
8 state law.

9 And then there were the two questions about what
10 the Court ought to do about interference -- alleged
11 interference with groundwater -- by groundwater pumping
12 outside a reservation with respect to surface water inside a
13 reservation.

14 And where we are in that context is that neither
15 of the amended counterclaims makes any allegation that there
16 is any present interference by groundwater pumping with the
17 sole -- the one recognized federal right in the Walker River
18 Decree, the 1859 right for the reservation.

19 Neither makes any allegation that groundwater
20 pumping outside the boundaries of any reservation will, in
21 fact, interfere with any federal right yet to be determined,
22 and we think that without those allegations the Court has no
23 jurisdiction to delve into whatever is going on with
24 groundwater pumping outside the boundaries of any of these
25 reservations.

1 I think on the issue of does the Court have to
2 address that at the same time as addressing the question of
3 what other federal surface water rights exist, I think --
4 based on my reading, I think the United States and the Tribe
5 agree that it does not need to do that, and we agree that it
6 does not need to do that.

7 But this is not really simply an issue of what
8 the -- what will be in a prayer -- what is in the prayer for
9 relief in the sense that the relief requested is that a
10 groundwater user be enjoined -- groundwater user outside the
11 boundary of a reservation be enjoined from asserting any
12 adverse rights, title, or interest, in or to the federal
13 rights that are ultimately determined.

14 Those users are entitled to know at some point
15 in time that -- whether or not their pumping could be in
16 violation of any such provision, and they can't know that
17 without some specifics of interference, and they can't know
18 that and deal with that without knowing what the relationship
19 from a priority perspective is with their groundwater rights
20 to any of the groundwater -- or any of the other rights,
21 surface or groundwater, that might be determined by the Court.

22 So on that issue we agree that the United States
23 doesn't have to prove anything today or going forward right
24 now about interference. However, we think the United States
25 has to at least allege it under the *Orr Ditch* case, and if it

1 doesn't allege it, which it hasn't, there is no jurisdiction.

2 That's kind of where I wind up on all those,
3 your Honor. Thank you.

4 THE COURT: Okay. Thank you so much.

5 Anybody else want to add on the motions to
6 dismiss?

7 MR. STOCKTON: Just real briefly, your Honor.
8 Bryan Stockton for Nevada Department of Wildlife.

9 Our motion was limited to the Orr Ditch Decree
10 that -- or case that you discussed somewhat with Mr. DePaoli,
11 and I agree with your analysis.

12 The only thing I was a little confused about is
13 you asked a question about this Court setting priorities, and
14 I think as far as to groundwater rights, those priorities are
15 set by the state engineer.

16 So that's our only motion, is that in this case,
17 if the United States and the Tribe do allege that the
18 groundwater pumping is interfering with their decree rights,
19 that this Court would only determine the extent of that
20 interference and then issue that -- that -- an order to the
21 state engineer to curtail pumping of groundwater to the extent
22 needed to avoid any interference with the Tribe's decreed
23 rights.

24 So that's all we're asking in that motion.

25 The other issue that I wanted to talk just

1 briefly about is the public trust issue which we did not file
2 a motion in the Mineral County case, in the 128 case, against
3 Mineral County. However, Mineral County has incorporated all
4 those arguments into this case through its response to the
5 motions to dismiss.

6 And the problem there is -- well, just briefly,
7 and I talked about this in my reply, is that we think it's
8 appropriate where it was suggested that this be referred to
9 the Nevada Supreme Court to determine the extent and the
10 parameters of the public trust law in Nevada because public
11 trust is a creature of state law, and the water has to be
12 administered both by state procedural and substantive law.

13 And the difference between the *Lawrence* case and
14 this case, which Mineral County completely glosses over, is
15 that the developers in Clark County could live without those
16 additional acres of land that were determined to be under the
17 public trust, and the difference is here you've got to balance
18 a lot of issues that are -- involve public policy choices --
19 well, not -- policy choices, you know, between the other
20 wildlife values that are upstream from Walker Lake, the people
21 on the river that can't live without the water, including the
22 Tribe, and also the values of Walker Lake.

23 So we disagree with Mineral County's analysis
24 that the public trust law in Nevada is crystal clear.

25 So, thank you.

1 THE COURT: Thank you.

2 All right. Let's call for opposition, please.

3 California -- by the way, before I cut you off,
4 California had nothing to add? Okay.

5 UNIDENTIFIED SPEAKER: Unless you have specific
6 questions for us, your Honor, we have nothing to add at this
7 point.

8 THE COURT: Thank you so much.

9 MR. GUARINO: My goal is to not spill this.

10 Good morning, your Honor.

11 THE COURT: Good morning.

12 MR. GUARINO: For the record, my name is Guss
13 Guarino, and I represent the United States. I appear in court
14 with Mr. Negri, of course.

15 And as we've explained to the Court before, my
16 principal role in representing the United States associated
17 with this litigation has to do with the Indian interests that
18 the United States holds. Mr. Negri is primarily tasked with
19 addressing the non-Indian interests.

20 But with respect to the comments that we have to
21 the Court, I believe my comments will address all of the
22 concerns associated with the United States, and I believe it
23 will also address a lot of the concerns that have been raised
24 by the Tribe as well. But after I speak, of course,
25 Mr. Williams will have an opportunity to come up and speak as

1 well.

2 Obviously, my comments here are nothing but a --
3 but a -- it's not an expansion or divergence from anything
4 we've put in our pleadings, and I think what we've put in our
5 response to the motions to dismiss that have been filed are
6 fairly thorough and detailed relying upon case law that we
7 believe controls the issues that have been raised by the
8 motions to dismiss.

9 And so the -- my goal in the conversation we're
10 having this morning, your Honor, is to do this. I'd like to
11 step back just a little bit, and I'd like to talk about a
12 couple of big things, because there's a couple of big things,
13 I think, that are moving here that, as the Court takes a look
14 at the circumstances of the motions, the circumstances of this
15 case, and really what are the questions that are being raised
16 by these motions, we think that the answer is fairly clear on
17 what the Court needs to do. At this juncture, it needs to
18 deny the motions to dismiss that have been filed, very simply.

19 So let me talk just very briefly about the
20 nature of the motions and as Mr. DePaoli has described.

21 They moved to dismiss a specific element of the
22 water rights claims of the United States, and the Walker River
23 Irrigation District describes that this Court has no
24 jurisdiction, there's no jurisdiction to decide
25 state-law-based water rights claims, but to get there, the

1 Irrigation District has to -- has to create something.

2 It describes that the Court does have
3 jurisdiction under federal law to consider the
4 federal-law-based water rights claims of the United States,
5 but to address these -- any of these claims, the Court needs
6 to create a new action.

7 Now, our water rights claims were not filed in a
8 new action, they were filed in this action, the action that
9 was initiated in 1924, and have always been there, and the
10 notion that this Court has some sort of inherent power to
11 simply inject the United States into another cause of action
12 that it did not believe, we believe the Court does not have
13 such authority.

14 The United States very clearly has sovereign
15 immunity from being sued or being brought into a lawsuit that
16 it did not initiate, and we just haven't done that, that thing
17 that the Walker River Irrigation District would suggest that's
18 what we would have to do.

19 But even in such a construct, assuming that such
20 a construct could be constructed, this motion that the
21 Irrigation District has presented says that, in fact, this
22 Court is precluded, is precluded from considering water rights
23 claims brought by the United States that are based upon state
24 law, precluded by state law. That is the way we have
25 addressed or viewed these motions. That's what we think the

1 motions are asking.

2 With respect to the second motion that's really
3 in play here, the motion that was presented by the Circle Bar
4 N Ranch Group, they join, of course, the Walker River
5 Irrigation District's motion, but they do something a little
6 different.

7 They simply say, well, we're not advocating for
8 a construction of a new action, the water rights claims were
9 brought into this -- this action that's existed since 1934,
10 and the United States had no ability to do that, and therefore
11 everything that the United States has filed should be
12 dismissed.

13 That's where we're starting from. Those are the
14 motions that are before the Court.

15 I'll address the -- I'll address the
16 Department's motion to dismiss to the extent it's necessary,
17 your Honor, but I think based on the comments from the
18 Irrigation District and from the Department itself, I think a
19 very clear, clean reading of the amended complaint -- amended
20 counterclaims that the United States has filed or relied upon,
21 there's no allegation of interference.

22 What we ask the Court is to quiet title to our
23 water rights, our additional water rights that we believe
24 exist, and to declare that anybody else making any claim to
25 those water rights that we claim should be quieted.

1 Okay. We're not claiming that there's an
2 interference going on anywhere, and to the extent such an
3 interference might be going on, the United States needs to
4 take some sort of action to protect the water rights that are
5 found by this Court through these proceedings, we'll take that
6 action at the appropriate time and through the appropriate
7 mechanisms that we have.

8 But so these are -- the real nature of the
9 motions to dismiss are as I've described, and before I get
10 into actually the two questions that I think are put before
11 the Court, I'd like the Court to consider the nature of these
12 proceedings and how we've gotten here, because it's taken well
13 over a hundred years to get here.

14 This is not a general stream adjudication. It
15 wasn't initiated as a general stream adjudication. It was
16 initiated as a dispute between water rights holders in the
17 state of Nevada and the state of California at the turn of the
18 century.

19 And there was a lawsuit filed in the predecessor
20 to this court, in the Nevada Circuit Court then but now the
21 Nevada District Court, in which one group of -- Nevada group
22 of water rights holders came into this court and said we have
23 water rights and those water rights are being interfered with
24 by folks in California, and in California those folks went to
25 their state courts and made the same allegations.

1 Ultimately injunctions were issued, and that
2 matter percolated right up through the Supreme Court, and
3 through the decision of Justice Holmes, the Court found that
4 it was this Court, and only this Court, that could have
5 jurisdiction over this dispute given the nature of this
6 dispute.

7 Again, this is not a general stream
8 adjudication. This is not a situation in which this
9 interstate stream system is subject to a compact. This was a
10 creature that was created at the turn of the century under the
11 specific circumstances, but at this point we see that the
12 Court is recognizing that the jurisdiction to resolve such
13 disputes is here.

14 Subsequent to that, the disputes of the parties
15 were resolved in what we now refer to as Decree Number 731,
16 and in 731 the dispute was resolved and the decree was issued.

17 The United States was not part of that suit, it
18 could not be made part of that suit at that time. Although
19 the United States was invited to have its water rights decreed
20 under the 730 decree action, the United States did not waive
21 its sovereign immunity and step into court and have its rights
22 determined at that point.

23 Several years later it initiated this, this
24 action. It initiated this action to address the surface water
25 irrigation rights of the Walker River Tribe, and the lawsuit

1 ensued.

2 Ultimately we know where that ended. All of the
3 rights that were decreed in 738, 731 were incorporated into
4 this decree. Those were all state-law-based water rights that
5 were determined by the Court based upon the laws of Nevada and
6 California.

7 And, in fact, at the time, in 1936, the Court
8 incorrectly found that there were no federal-law-based water
9 rights, that -- and determined that the United States and the
10 Walker River Tribe held what were essentially state-law-based
11 water rights.

12 So at least back in 1936 the Court definitely
13 had the ability to determine that the United States held
14 state-law-based water rights, and, of course, the Ninth
15 Circuit decision issued and informed the Court that it was
16 incorrect about its decision associated with reserved rights.

17 Since 1940, this Court has had very broad, very
18 complete, very exclusive jurisdiction over matters associated
19 with water rights, water and water rights in the Walker River
20 Basin. There's only been one court, this court.

21 When the Court considers what it needs to do in
22 response to these motions, that this Court doesn't have
23 subject matter jurisdiction at all, this Court needs to
24 consider precisely the evolution that has occurred, the very
25 unique evolution that has occurred, in this case.

1 This case is not a general stream adjudication,
2 as I've said. This case is unlike any other case that is,
3 frankly, in federal court anywhere else. The circumstances
4 are very unique. The Court has secured its jurisdiction in
5 this case.

6 Now, of course, the United States filed in 1992,
7 along with the Tribe, its claims for additional water rights.
8 It filed them as counterclaims to the petition that the Walker
9 River Irrigation District filed, and in 19 -- and in 1997 it
10 amended those counterclaims and claims for additional water
11 rights to include not only the Walker River Indian Tribe,
12 Walker River Paiute Tribe water rights, but all federal
13 interests that exist in the basin, whether they are other
14 Indian groups that exist in the basin, or the other -- many
15 other federal interests that exist in there.

16 We claimed both state- and federal-law-based
17 water rights. We did that because we believe this is where
18 jurisdiction lies.

19 Now, with respect to what questions that this --
20 these motions to dismiss raise, we believe that they raise,
21 frankly, two questions.

22 One, what is the nature of the Federal District
23 Court of Nevada's jurisdiction. We believe it is exclusive,
24 and we believe it is exclusive over the subject matter of this
25 case which is the water of the Walker River Basin.

1 Now, there's been some discussion about
2 interference and about whether or not there's interference
3 with actual stream flows, or interference with -- you know, it
4 raises the question of whether or not there's a groundwater
5 interference to -- groundwater interference to surface water.

6 But what we know is that when we filed the
7 amended counterclaims that incorporated groundwater claims
8 throughout the basin for both Indian and non-Indian interests,
9 we showed the Court through affidavit that there was
10 connectivity between the surface water and groundwater of the
11 basin.

12 To the extent that exists, and does it exist in
13 every aspect and at every turn, we don't know yet, of course,
14 because we haven't developed the case to that point to present
15 the evidence to show that connectivity.

16 So to the extent that any jurisdiction might
17 turn upon whether or not there is connectivity to the surface
18 water streams, or surface water that might be unconnected to
19 some sort of a body of groundwater that we might be utilizing,
20 it's not connected to the surface water streams of the Walker
21 River, we haven't gotten there yet.

22 But nevertheless what we have here is we have a
23 question of addressing what is the nature of the jurisdiction
24 of the Court, and we've put in our brief and explained our
25 rationale for why we believe it is exclusive.

1 And we did not make up this phrase, your Honor,
2 we did not invent the notion of exclusive jurisdiction out of
3 the ether. This is the description of the jurisdiction that
4 every court that we have examined seems to describe the
5 jurisdiction of this court in water rights disputes such as
6 this.

7 In 1910, the Supreme Court looked at the Walker
8 River Basin and said that this court was seized, that it made
9 no sense for -- given the nature of the subject of this case,
10 the flowing waters across the border of California and Nevada,
11 that it was this court to have jurisdiction.

12 In 1922, the Supreme Court issued its *Kline*
13 *versus Burke Construction* decision in which this court
14 described the -- the Supreme Court described very clearly that
15 when the matter is one that is *in rem*, that the court that
16 first exercises its jurisdiction over the *res* of the case, the
17 *r-e-s* of the case, that court gets exclusive jurisdiction
18 going forward.

19 Now, since those cases have been issued, the
20 Ninth Circuit has examined the jurisdiction of this court as
21 it relates to water rights, water disputes and water rights
22 disputes in the basin. It has described this court's
23 jurisdiction as in the nature of *in rem* which means that the
24 court's jurisdiction over the waters of the basin are
25 exclusive.

1 That's what we believe that the courts have
2 said, and, in fact --

3 THE COURT: In what case did they say that?

4 MR. GUARINO: I would point the Court very
5 specifically to the *United States versus Alpine Land and*
6 *Reservoir* case issued in 1999.

7 In that case, the court was describing not just
8 the jurisdiction --

9 THE COURT: Now, here's the critical question I
10 have there. That was a general decree case, was it not?

11 MR. GUARINO: As in a general stream
12 adjudication case?

13 THE COURT: Right.

14 MR. GUARINO: Okay. Yes.

15 THE COURT: So logically --

16 MR. GUARINO: I believe so. I'm not as familiar
17 with that level of circumstance, but I don't -- I think that's
18 correct.

19 THE COURT: So logically isn't that analysis
20 prohibited in our case which you've already told me was not a
21 general stream adjudication, was just simply an adjudication
22 between rights across states?

23 MR. GUARINO: I don't believe that's a
24 distinction that makes a difference here, your Honor.

25 THE COURT: Why?

1 MR. GUARINO: And the reason is this. When you
2 examine the discussion that the court was having concerning
3 the jurisdiction, it did not make that distinction. What it
4 talked about was the water.

5 THE COURT: Well, why would it make the
6 distinction if, as my memory reflects, it was a general stream
7 adjudication? It makes sense to say there's *in rem*
8 jurisdiction.

9 That's a question that I asked right at the
10 outset of my taking over, is there not *in rem* jurisdiction
11 over this case, and it occurs to me that there is, but that's
12 directly contradicted by your suggestion -- logically your
13 suggestion that this case started out not as a general stream
14 adjudication, it was an interstate conflict.

15 MR. GUARINO: That's correct -- well, your
16 Honor, it was -- as I said, it wasn't started out -- it's not
17 a general stream adjudication. It has evolved into something
18 that has, frankly, never existed in federal jurisprudence
19 before.

20 But the distinction that you're drawing --

21 THE COURT: Then how can I use that analysis for
22 *in rem* applicable to *Alpine* in this case?

23 MR. GUARINO: Because the exclusivity of this
24 court's jurisdiction attaches to the *res* of the case, the
25 *r-e-s* of the case, and that is the waters of the Walker River

1 Basin.

2 THE COURT: But you've just told me that the *res*
3 is not the waters, appropriated or otherwise, of the entire
4 stream, and certainly not the groundwater. The *res* is simply
5 the dispute over those rights adjudicated in the prior decree
6 across state lines.

7 MR. GUARINO: Your Honor, if I -- if that's the
8 impression of the Court, that's not what I meant to say. The
9 *res* of the case is not the rights, the *res* of the case is the
10 waters.

11 I've mentioned, only to the extent --

12 THE COURT: All of the water in the entire
13 basin.

14 MR. GUARINO: At least --

15 THE COURT: Okay.

16 MR. GUARINO: What we don't have is we don't
17 have the circumstances of whether or not there's some body of
18 groundwater that exists in the basin that is wholly and
19 entirely hydrologically disconnected from the river itself,
20 some ancient aquifer that's just -- has some sort of complete
21 disconnect from the river.

22 And to the extent any issue of this Court's
23 jurisdiction turns on that, we'll get there when that
24 circumstances -- or when that circumstance arises.

25 What the motions are saying is that --

1 THE COURT: Boy, it just seems like you're
2 coming at me from two different logical points of view.

3 You're saying that if and when you have an
4 interference issue, you'll raise it in some other or
5 appropriate court, and you're certainly not waiving your
6 sovereign immunity with respect to those issues.

7 But, on the other hand, you're telling me I have
8 the res, the entire basin, and all sources of water. I don't
9 get the logic of that.

10 MR. GUARINO: The connection of the logic there
11 would be, your Honor, that if the United States felt that it
12 was -- that its rights were being interfered with, then
13 there's only one place that we would go to seek redress.

14 THE COURT: This case? Because I have the res.

15 MR. GUARINO: Your Honor, let me make -- let me
16 make a distinction here because that comment actually cuts a
17 very -- cuts a line between what I think the two questions are
18 that are raised by these motions to dismiss.

19 One is what is the nature of the jurisdiction of
20 this court, the federal district court --

21 THE COURT: This case.

22 MR. GUARINO: And then what is the nature of
23 this court's jurisdiction in this case. Okay.

24 And the nature of the jurisdiction that stems in
25 this case comes from the decree that this court issued, and in

1 the decree this court said that the court retains jurisdiction
2 of this case for correcting or modifying the decree.

3 Now --

4 THE COURT: Sure. That doesn't give me the
5 authority to retain something that that court did not have. I
6 can only retain that jurisdiction that I have.

7 MR. GUARINO: That is correct, your Honor.

8 THE COURT: At the time.

9 MR. GUARINO: Your Honor, but the court had the
10 jurisdiction over the parties, it had jurisdiction over the
11 water. There's nothing left, I believe, for the court to have
12 jurisdiction over.

13 THE COURT: Okay.

14 MR. GUARINO: The court has the jurisdiction
15 over the *res* of the case, and it has maintained that
16 jurisdiction in this action, and so --

17 THE COURT: And I had jurisdiction -- at the
18 time the decree was issued, I had -- this court had *in rem*
19 jurisdiction over all of the issues you're raising now.

20 MR. GUARINO: Yes, your Honor.

21 THE COURT: Okay.

22 MR. GUARINO: And then if -- if the court
23 issued -- if the court issued a different decree back in 1936,
24 then we would not be -- we would not have filed the motion --
25 the amended counterclaims in this case.

1 The amended counterclaims and the claims of the
2 United States were brought in this case because the court
3 allows us to do so in this case, and that's what the court
4 contemplated back then.

5 You know, Mr. DePaoli was describing that the
6 court wouldn't have done such a thing, but as he was saying
7 that, my very simple thought was, look, if the court knew --
8 it was 1936, the court knew there would be further
9 development, what about all the other rights that are coming
10 into existence through prior appropriation and the application
11 of state law?

12 The court had the ability to maintain --

13 THE COURT: Well, certainly -- I'm being a
14 little facetious here, but certainly that court at that time
15 did not have, nor could it retain, the air rights over those
16 lands, right? I mean, that's a far-out example.

17 MR. GUARINO: I understand the Court's -- yes.

18 THE COURT: Okay.

19 MR. GUARINO: So -- so -- you know, what -- the
20 second question of what's the nature of this court's
21 jurisdiction in this case, I believe the Court needs to look
22 at the decree that was issued.

23 And I think all the parties in their pleadings
24 have agreed that the Court needs to use the plain language
25 that the court used back in 1936 to decide whether or not the

1 United States has any ability to do anything up to -- to file
2 the counterclaims that it's filed in this case. We believe
3 that's what paragraph 14 allows us to do, this modification.

4 And the example I was using in preparation for
5 this oral argument to the Court is this: You know, if you and
6 I engaged in a contract for whatever, to purchase something,
7 or to provide services or something like that, we could come
8 to terms on a contract. If we want to come back later and
9 modify the contract, we can do that, too.

10 A modification is a change to the contract. I
11 think -- or is a change. Mr. DePaoli just described that in
12 oral argument very clearly, modification is a change.

13 Now, what the defendants seem to want to do is
14 they say pretty much any change is fine except for what the
15 United States is asking the Court to do.

16 So new water rights, no, there's a preclusion,
17 there's a state law preclusion that's going on that the Court
18 has no longer the ability to even determine what
19 state-law-based water rights are, but for anything else -- for
20 anything else, we can bring -- modifications can be made to
21 the decree.

22 In fact, decisions can be made by other state
23 agencies in some other adjudicative process, and then those
24 decisions can be brought up and brought back into this decree.
25 The Court has the ability to do that, but not in the first

1 instance to make a decision for itself.

2 We're asking the Court to make the decision. We
3 believe the Court has both the exclusive jurisdiction and the
4 jurisdiction within this case to do precisely -- precisely
5 that.

6 Now, with respect to the discussion about
7 interference, whether we claim interference or not does not
8 strip this Court of jurisdictional bases to hear a claim.

9 We don't have -- there's no -- the Walker River
10 Irrigation District provides no bases to say that irrigation
11 is required to be alleged for the Court to consider any
12 element of the claims that we're asking the Court to decide in
13 the first instance.

14 With respect to the motion to dismiss that the
15 Department -- the Department has presented, it's based upon
16 the premise that we're alleging in this -- in this -- in these
17 circumstances interference. We're not doing that.

18 In our prayer for relief, we very clearly say
19 that we're asking the Court to quiet title to water rights
20 that we believe -- the additional water rights that we believe
21 we have and to declare that no one else has those water
22 rights.

23 It's not an interference matter, but it's a --
24 if somebody has a claim --

25 THE COURT: You're not asking for an injunction

1 against such interference.

2 MR. GUARINO: I believe our amended counterclaim
3 speaks for itself, your Honor, and so I don't believe that
4 this Court should make any decision at all based upon
5 potential interference or how potential claims for
6 interference may affect the jurisdiction of the Court. It is,
7 at a minimum, premature.

8 Your Honor, at this point those are my prepared
9 comments.

10 THE COURT: Thank you so much.

11 MR. GUARINO: And if the Court has other
12 questions, of course, you can call me back.

13 I did not spill my water.

14 THE COURT: Mr. Williams.

15 MR. WILLIAMS: Good morning, your Honor.

16 THE COURT: Good morning.

17 MR. WILLIAMS: Wes Williams, Jr., on behalf of
18 the Walker River Paiute Tribe.

19 I would just like to join Mr. Guarino's
20 comments, and I only have one simple --

21 THE COURT: Please.

22 MR. WILLIAMS: -- item to point out, and that
23 is, as far as Mr. DePaoli was mentioning the -- arguing
24 regarding the state law claims that were alleged in the United
25 States' counterclaim in the complaint, the Tribe's complaint

1 alleges -- it has three claims, and they're all
2 federal-law-based claims. The Tribe doesn't rely on any state
3 law claims, and that's simply the thing I wanted to add.

4 THE COURT: It's an important distinction, I
5 understand that.

6 MR. WILLIAMS: Thank you.

7 THE COURT: Thank you. From Mineral County.

8 MR. HERSKOVITS: Yes, your Honor. Thank you.
9 Good morning again. Simeon Herskovits for Mineral County,
10 also representing the Walker Lake Working Group.

11 I really have only a couple of remarks. This is
12 the motion -- the hearing on the motions to dismiss in the 127
13 case relating to the claims of the United States and the
14 Walker River Paiute Tribe.

15 As far as the issue raised by Mr. Stockton
16 regarding the Public Trust Doctrine and the state of the law
17 under it, we are comfortable resting on our discussion of that
18 issue in our briefs and at the previous oral argument.

19 I just want to clarify that in our very limited
20 response to these motions to dismiss, we incorporated only the
21 portion of our brief that related to this question of the
22 scope of the decree and the retained jurisdiction over
23 different sorts of claims.

24 We did not address the Public Trust Doctrine,
25 but I think our briefs address the issues that Mr. Stockton

1 touched on, and there seems to be some agreement that should
2 the Court believe the issue is unclear, the state of the law
3 is so unclear, that you cannot --

4 THE COURT: Refer it.

5 MR. HERSKOVITS: -- apply it yourself, that the
6 procedure under Nevada Rule of Appellate Procedure 5 to
7 certify the question to the Nevada courts is appropriate.

8 THE COURT: Okay. Thank you.

9 MR. HERSKOVITS: Thank you.

10 THE COURT: Please, responses.

11 MR. DePAOLI: Just briefly, your Honor. Gordon
12 DePaoli on behalf of the Walker River Irrigation District.

13 If your Honor does not have the authority to
14 treat these amended counterclaims as a new and independent
15 action under the federal rules, then I think your Honor has to
16 dismiss the claims because there is no jurisdiction absent
17 treating them as a separate action.

18 THE COURT: Well, do I not have that authority?

19 In other words, even if I agree with you, do I
20 not have the authority to keep the complaint alive as, in
21 essence, raising a new claim, and I have jurisdiction to do
22 that, and, of course, even if I agree with you that there's
23 incomplete pleading, I have to give them an opportunity to
24 amend to fully set it out.

25 Don't I have that authority?

1 MR. DePAOLI: I think you would have the
2 authority to give them the opportunity to amend, but if
3 their -- if they --

4 THE COURT: Don't I have the authority
5 jurisdiction to entertain a new lawsuit subsumed in or
6 incorporated in their counterclaim?

7 MR. DePAOLI: Yes. That's -- I think that's
8 what I'm saying, your Honor, is you have the ability to treat
9 them as new lawsuits which are their claims.

10 THE COURT: You're just simply saying that if I
11 agree that it is a new lawsuit, and if I agree that I don't
12 have jurisdiction to entertain it, then I just have to dismiss
13 totally. That's all you're saying.

14 MR. DePAOLI: Yes.

15 In terms of the argument that Mr. Guarino made
16 that this Walker River action is absolutely unique, that there
17 is nothing like it anywhere, there is really no difference
18 between this litigation that resulted in the Walker River
19 Decree and the Orr Ditch Decree.

20 As a matter of fact, the Orr Ditch Decree only
21 adjudicated, I think, only one water right in California on
22 the Truckee River at all and that was the rights to water
23 from -- rights to water from Lake Tahoe.

24 The other water rights to the Truckee River in
25 California, both before the Orr Ditch Decree and after, and in

1 Nevada after the decree, have never been part of the Orr Ditch
2 Decree at all.

3 And so the -- there is nothing unique about this
4 case that says this Court has to have exclusive jurisdiction
5 over all water sources within the Walker River Basin.

6 The *Kline v Burke* case was a case that involved
7 two different *in personam* actions, and the Court said that
8 both could proceed. It did have dicta in there about two
9 courts could not have *in rem* jurisdiction over the same
10 property, but that wasn't the issue.

11 And this is not -- this is not and never has
12 been an *in rem* jurisdiction case in the true sense of *in rem*
13 jurisdiction.

14 The Walker River and all the sources of water
15 within the Walker River Basin are not like some ship over
16 which people are making claims to, or not even like some piece
17 of property where people are making competing claims to.

18 What the actions involved was quiet title over
19 the rights to use water from the Walker River and its
20 tributaries.

21 THE COURT: But didn't the Supreme Court so hold
22 impliedly when it told California you cannot proceed with your
23 cases, which clearly had jurisdiction over all of the sources
24 of water, I suppose -- I guess all that was asserted there was
25 appropriative rights. But didn't the Supreme Court impliedly

1 say so that -- when they stopped the California court, that
2 this court had, in essence, *in rem* jurisdiction over all of
3 it?

4 MR. DePAOLI: I don't think so, your Honor. I
5 think all of the *Rickey* cases recognized that the courts --

6 THE COURT: There's another way to see it, and
7 that is they were telling the California court you could not
8 proceed with respect to those *in personam* issues that were
9 pending in this court --

10 MR. DePAOLI: Yes.

11 THE COURT: -- because those issues included
12 interstate issues.

13 MR. DePAOLI: Essentially that case was simply
14 the first filed case ought to proceed. You had the case first
15 filed in Nevada with everybody appearing, and then you had the
16 California defendants go file two other cases in California
17 that they wanted to pursue, and the Supreme Court just said
18 the first case filed proceeds, which is not an unusual rule.

19 THE COURT: You're not saying that that's not on
20 the basis -- that is not on the basis of *in rem* analysis,
21 that's simply on the basis of competing claims in different
22 courts.

23 MR. DePAOLI: Yes, that's what I'm saying,
24 competing claims in different courts.

25 The *Alpine* case that Mr. Guarino referred to,

1 what happened there was that a water right recognized by the
2 Alpine Decree was being changed through the state engineer.

3 The state engineer made a decision, and what
4 happened is some parties asked the Nevada state court to
5 review that state engineer decision. Based upon that, the
6 parties who had obtained the change went to the Alpine court
7 and said, no, you have jurisdiction over this water right by
8 reason of the fact that you adjudicated it, it's subject to
9 your decree, therefore you have the exclusive jurisdiction to
10 review that state engineer decision.

11 And that's really all that that case stands for,
12 your Honor. It doesn't stand for a determination that the
13 Alpine court has jurisdiction over all sources of water in
14 Nevada and California within the entire Carson River Basin.
15 It doesn't say that or even suggest that.

16 It's simply a matter of the court that issued
17 the decree has the power to enforce it and prevent
18 interference with its decree which is what was going on by
19 trying to get a ruling of the state court on the state
20 engineer's change to that Alpine Decree water right.

21 Lastly, your Honor, we -- Mr. Guarino says there
22 is no real issues of interference here, they haven't been
23 alleged, and I agree with that.

24 What I don't agree with is this idea that the
25 Court, in quieting title to the water rights that are being

1 claimed, can essentially prevent others from making claims as
2 to those water rights, and I don't think that's what anybody
3 would be doing.

4 The problem with -- that makes water different
5 from quiet title action to real estate, for example, to land,
6 is that when the water source is common, what you need to know
7 is the relative rights. Because when someone pumps
8 groundwater that, as he says, may have a connectivity to
9 somewhere else, you can't say you're enjoined from pumping
10 that without at least at some point determining what that
11 connectivity is and knowing what the relationship between that
12 groundwater right is and what the court has determined to be
13 the federal rights.

14 And so -- and we may all be in agreement here
15 that the interference issue is not before the Court at the
16 present time and should not be, but an injunction that says
17 you're enjoined from doing anything that does anything to that
18 right cannot be so broad as to, in effect, deal with that
19 interference issue silently.

20 THE COURT: Well, counsel has disclaimed that
21 he's asking for such an injunction in any event.

22 MR. DePAOLI: Yes.

23 That's all I have, your Honor.

24 THE COURT: Okay. Thank you.

25 Any other replies?

1 All right. This matter is submitted.

2 I appreciate your comments. I think I got it,
3 and I'll just have to determine in my own mind what law
4 applies.

5 I'll issue these decisions pretty quickly here,
6 and I think I will certify them because we need a basic
7 understanding from the Circuit before we go a lot further as
8 to what law applies.

9 So I'll take them under submission, all of them.
10 I appreciate so much your coming, and, of course, I'll welcome
11 you back, I'm sure, in the near future. Thanks again.

12 -o0o-

13

14 I certify that the foregoing is a correct
15 transcript from the record of proceedings
in the above-entitled matter.

16 /s/Margaret E. Griener 8/10/2015
17 Margaret E. Griener, CCR #3, FCRR
Official Reporter

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